Public Prosecutor v Joseph bin Hending

HIGH COURT (SIBU) — CRIMINAL TRIAL NO 45–8 OF 2006
HAMID SULTAN JC
3 SEPTEMBER 2008

Criminal Law — Penal Code — s 302 — Murder — Prosecution's case — Maximum evaluation of evidence — Whether prima facie case established — Whether accused ought to be acquitted without having to enter defence

Criminal Procedure — Trial — Close of prosecution's case — Maximum evaluation of evidence — Assessment of credibility of prosecution's witnesses — Whether prima facie case made out — Criminal Procedure Code s 180

Evidence — Witness — Credibility of — Contradictory or discrepancies in evidence — Evidence doubtful and highly questionable — Whether court to treat evidence with suspicion — Whether sufficient reasons for rejecting evidence — Whether attempt made to introduce statements of witness who could not be subpoenaed

The accused, with another who is still at large, faced a charge of murder by causing the death of one Roslan Hisyam ('the deceased') on 29 June 2004 at about 7.30pm at the deceased's friend's house at Simpang Empat Aloi, in the District of Belaga, State of Sarawak, punishable under s 302 of the Penal Code. The main witness for the prosecution was PW1. His evidence on the whole was sketchy and did not reflect the true facts nor did he explain in a comprehensive manner why the incident took place save that he witnessed the murder. His evidence was that at about 7pm, two men came and attacked the deceased when he, together with the deceased, were having coffee at Ilya's house, a friend of the deceased. At the time of the attack, Ilya was in the kitchen, and she did not witness the incident. PW1 was able to witness the incident as it took place only three meters away from the place where he was. PW1 did not know Joseph, the accused, before the incident but the deceased, had before the incident, while having coffee, informed him that Joseph was his friend. On the day of the murder, the accused had a tattoo on the left side of his face and had long hair. The day after the murder, PW1 had left for Bintulu and there he met the wife of the deceased, Lily, who was an Indonesian. PW1 brought her to the police station and had lodged a report. Later, with the police and the deceased's wife, they went into a house where

there were 17 persons, Lily and PW1 identified the accused. PW2 was the officer who arrested the accused. At the time of the arrest, the accused had already cut his hair. On 1 July 2004, the accused went with the police to a river and found the body of the deceased. During cross-examination, PW2 admitted that when he arrested the accused, there was information that there was another assailant by the name of Jubert. He also agreed that there was a tattoo on the face of the accused. Further, PW5, investigating officer, informed the court that a person by the name of Angeline had, on 29 June 2004, seen a fight between the deceased and Chong @ Joseph Hending and Jubert.

Held, acquitting and discharging the accused:

(1) The main witness for the prosecution was PW1 and he confirmed that the accused had long hair and had a tattoo on the left side of the face. When the accused was identified at the time of the arrest, this statement was further confirmed by PW2. When the photo of the accused after his arrest was produced, no 'tattoo' mark was found in the photo. Further, there was also no 'tattoo' mark on the accused at the dock and no evidence was led to explain these discrepancies despite the repeated requests from the court to throw light on the issue of identification (see para 7(i)).

(2) The evidence of PW1 was ambiguous. He gave very sketchy evidence without explaining sufficiently an incident, which, if accepted by the court, would have dire consequence. PW1's evidence was such that the police ought to have investigated him in detail in respect of the murder. Further, the prosecution also did not call Ilya, Angeline and the wife of the accused to give evidence or at least to positively identify the accused and to throw some light as to why the incident took place though it may not be necessary for the prosecution to show motive. Further, no evidence was led to show how Lily, who had identified the accused, came to know the accused. Also, the statements of the witnesses who could not be subpoenaed for good reasons, were not even attempted to be introduced pursuant to the relevant section as set out in s 32(1)(i) and (j) of the Evidence Act 1950 (see para 7(ii)–(iv)).

[Bahasa Malaysia summary

Tertuduh, bersama seorang lagi yang masih bebas, dituduh membunuh dengan menyebabkan kematian Roslan Hisyam ('si mati') pada 29 Jun 2004 lebih kurang 7.30petang di rumah kawan si mati di Simpang Empat Aloi, di Daerah Belaga, Negeri Sarawak, yang boleh dihukum di bawah s 302 Kanun Keseksaan. Saksi utama untuk pihak pendakwaan adalah PW1.

Keterangannya secara keseluruhan tidak lengkap dan tidak membayangkan fakta sebenar dan dia tidak menjelaskan secara menyeluruh cara bagaimana insiden tersebut berlaku kecuali bahawa dia menyaksikan pembunuhan tersebut. Keterangannya adalah bahawa lebih kurang pukul 7 petang, dua orang lelaki datang dan menyerang si mati apabila dia, bersama-sama dengan si mati, sedang minum kopi di rumah Ilya, rakan si mati. Pada masa diserang, Ilya berada di dapur dan dia tidak menyaksikan insiden tersebut. PW1 menyaksikan insiden tersebut kerana ia mengambil tempat hanya tiga meter dari tempat dia berada. PW1 tidak mengenali Joseph, tertuduh, sebelum kejadian tetapi si mati, telah sebelum kejadian tersebut, semasa minum kopi memberitahunya bahawa Joseph adalah rakannya. Pada hari pembunuhan, tertuduh mempunyai tatu pada bahagian kiri mukanya dan mempunyai rambut yang panjang. Sehari selepas pembunuhan, PW1 telah bertolak ke Bintulu dan di sana berjumpa dengan isteri si mati, Lily, yang merupakan warganegara Indonesia. PW1 membawanya ke balai polis dan membuat laporan polis. Kemudian, dengan polis dan isteri si mati, mereka pergi ke sebuah rumah di mana terdapat 17 orang, Lily dan PW1 mengenal pasti tertuduh. PW2 adalah pegawai yang menangkap tertuduh. Pada masa ditangkap, tertuduh telah pun memotong rambutnya. Pada 1 Julai 2004, tertuduh bersama polis telah pergi ke sebatang sungai dan menjumpai mayat si mati. Semasa pemeriksaan balas, PW2 mengakui bahawa apabila beliau menangkap tertuduh, terdapat maklumat bahawa terdapat seorang lagi pesalah dengan nama Jubert. Beliau juga bersetuju bahawa terdapat tatu pada muka tertuduh. Selanjutnya, PW5, pegawai penyiasat, memberi tahu mahkamah bahawa orang yang dikenali dengan nama Angeline telah, pada 29 Jun 2004, melihat pergaduhan di antara si mati dan Chong @ Joseph Hending dan Jubert.

Diputuskan, membebaskan dan melepaskan tertuduh:

(1) Saksi utama pihak pendakwaan adalah PW1 dan dia mengesahkan bahawa tertuduh mempunyai rambut panjang dan tatu di sebelah kiri mukanya. Apabila tertuduh dikenal pasti pada masa penangkapan, kenyataan ini selanjutnya telah disahkan oleh PW2. Semasa gambar tertuduh selepas penangkapannya dibuat dikemukakan, tiada tanda tatu yang dijumpai di dalam gambar tersebut. Selanjutnya, tidak ada tanda tatu pada tertuduh di kandang pesalah dan tidak ada keterangan yang dikemukakan untuk menjelaskan percanggahan-percanggahan ini walaupun diminta berulang kali oleh mahkamah untuk menjelaskan isu pengenalpastian (lihat perenggan 7(i)).

(2) Keterangan PW1 tidak jelas. Dia memberikan keterangan yang tidak lengkap tanpa menjelaskan secukupnya suatu kejadian, yang, jika diterima oleh mahkamah akan mempunyai kesan yang teruk.

Keterangan PW1 adalah sesuatu yang polis sepatutnya membuat siasatan terhadapnya secara terperinci berkaitan dengan pembunuhan tersebut. Selanjutnya, pihak pendakwaan juga tidak memanggil Ilya, Angeline dan isteri tertuduh untuk memberikan keterangan atau sekurang-kurangnya secara positif mengenal pasti tertuduh dan menjelaskan mengapa insiden tersebut terjadi walaupun ia mungkin tidak perlu untuk pihak pendakwaan menunjukkan motif. Selanjutnya, tidak ada keterangan yang dikemukakan untuk menunjukkan bagaimana Lily, yang telah mengenal pasti tertuduh, mengenali tertuduh. Juga keterangan saksi-saksi yang tidak boleh disepina bagi alasan-alasan yang munasabah, tidak langsung cuba diperkenalkan menurut seksyen yang relevan seperti yang terdapat di dalam s 32(1)(i) dan (j) Akta Keterangan 1950 (lihat perenggan 7(ii)–(iv)).]

Notes

For cases on close of prosecution's case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4644–4707.

For cases on credibility of the witness, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2689–2705.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281 (refd)
PP v Peter Kong [2007] 5 MLJ 567 (refd)

Legislation referred to

Evidence Act 1950 s 32(1)(i), 32(1)(j)
Penal Code s 302

Ahmad Zubir bin Jantan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Dorsan bin Hassan (Ubaidullah & Associates) for the accused.

Hamid Sultan JC:

[1] This is my judgment at the end of the prosecution's case where the defence has submitted that there is no prima facie case for the charge of murder:

BRIEF FACTS

[2] The accused was charged under s 302 of the Penal Code. The charge reads as follows:

A Bahawa kamu bersama dengan seorang yang masih bebas pada 29hb Jun 2004 jam lebih kurang 7.30 maIam, bertempat di halaman rumah Abit di tepi Jalan Pembalakan Shin Yang di dalam daerah Belaga, di dalam negeri Sarawak, dengan memajukan niat bersama kamu telah membunuh Roslan Hisyam. Oleh itu, kamu telah melakukan kesalahan membunuh dan boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun Keseksaan yang sama.

B

The police report reads as follows:

Pada 29/06/2004 jam lebih kurang 1930 hrs. bertempat di Kolam, Simpang Empat Aloi Bakun, Belaga. Semasa saya bersama kawan bernama Roslan bin
C Hisyam umur 30 tahun, bangsa Bajau sedang berbual tiba-tiba datang 2 orang lelaki rakyat Filipino dan menyerang kawan saya bernama Roslan dengan menggunakan kayu dan parang. Akibat daripada kejadian itu saya percayai kawan saya telah mati dan tidak tahu di mana mereka buang. Seterusnya terus lari. Saya datang ke Balai Polis buat lapuran untuk tindakan selanjutnya. Inilah aduan saya.

D

[3] The main witness for the prosecution was PW1. His evidence on the whole was sketchy and did not reflect the true facts and nor did he explain in a comprehensive manner why the incident took place save that he witnessed the murder. His evidence can be summarised as follows: (i) he was
E the friend of the deceased since the year 2000; (ii) on 28 June 2004, he went with the deceased to collect some debts from the deceased's friend; (iii) after collecting the debt they spent the night at the deceased's friend house at Simpang Empat Aloi, Bakun Belaga; (iv) on 29 June 2004, at about 6.30pm both of them were having coffee at Ilya, (Philippino) house, who was a friend
F of the deceased, she made the coffee and was in the house at the time of the incident; (vi) about 7pm, two men came and attacked the deceased; (vii) a person by the name of Joseph who was carrying a parang said he wanted to kill the deceased; (viii) there was a fight and both of them attacked the deceased with a stick; (ix) it happen within 15 minutes; (x) at that time Ilya
G was in the kitchen, she did not witness the incident; (xi) the place was well lit and PW1 was able to witness the incident as it took place only three meters away from the place he was; (xii) after that, the two person dragged the deceased to a pond about 10 meters away and dumped the deceased in the water. After some time, a lorry came pulled out the body of the deceased, put
H into a drum and drove off; (xiii) once the body was loaded onto the lorry, Joseph came to him and asked for a cigarette; (xiv) he did not know Joseph before the incident but the deceased had, before the incident while having coffee, informed him that Joseph is his friend; (xv) Joseph on that day had a tattoo on the left side of his face and had long hair; (xvi) after the lorry left,
I he went into the house to sleep. Ilya was there but he did not speak as Ilya was afraid that they might come back to attack. Ilya also told him not to tell anyone about the incident; (xvii) on 30 June 2004, he left for Bintulu. There he met the deceased's wife, Lily, who was an Indonesian. PW1 brought her to the police station to lodge a report. Later with the police and the deceased's

wife, they went to many places relating the incident. They went into a house where there were 17 persons, Lily and PW1 identified the accused. The accused was the only person arrested. At the time of the arrest, the accused had already cut his hair, but Ilya saw his face and the accused had the tattoo on the face; (xviii) on 1 July 2004, he went with the police to the river and found the body of the deceased. The police took the dead body.

[4] The defence counsel says that the evidence of PW1 is too good to be true and quiet incredible, coincidence and extraordinary. Inter alia, that part of the submission reads as follows:

> It is humbly submitted that the event and sequence is just not rationale and extremely absurd. PW1 confidently identified the accused as Joseph because according to PW1 the accused have a tattoo on his left face and a long hair, twice during examination-in-chief.
>
> Ironically, all the police officers PW2, PW3 and PW5 testified that accused have tattoo on the left face despite the facts that there is none visible. PW5 even went to the extent that two photographs of accused during arrest three days after incident happened was brought forward but never introduced as evidence just to satisfy the anxiety wanting to know and see. This court should take judicial notice that there is no tattoo on the accused's left face.
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> To a suggestion by the defence when PW1 was put that the person who request for cigarettes after the incident is not the accused. PW1 disagreed. To another question put to him that when the incident happened there were about 20 persons at the scene of incident and that is why PW1 couldn't identify who actually hit the accused. PW1 disagreed. PW1 was also cross on why if he is so sure that Joseph took part in beating the deceased, Joseph name was not stated in the police report (exh P5), he answered maybe I made a mistake in not putting his name.
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> It is humbly submitted that a reasonable man who witnessed something important such as murder, if he 100%. sure and certain that he knows the identify of the accused, he would by all means told the police the name and put it in his police report to make it easier for the police to track and arrest the murderer. Could PW1 not really sure who the assailant was and he keep remembering a man with a tattoo on the left face with long hair?
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> In examination-in-chief, PW1 testified that it was Lily, the deceased's wife who identified the accused when the police were making raids and this evidence is corroborated with PW2 and PW3 testimonial, that the deceased's wife is one of those who identified the accused. How did the deceased's wife know who attacked the deceased when she was never at the scene of the incident? She was in Bintulu during the whole incident, how can she be so sure and certain that accused were one of the assailants? The prosecution had informed this court that they are unable to subpoena the deceased's wife who has left the country for Indonesia. The deceased's wife is crucial to this case but this court was deprived of opportunity to listen to the deceased's wife testimony because she was not available.

[5] PW2 was the officer who arrested the accused. He confirmed that the deceased wife and PW1 had identified the accused. Upon search on the accused, a purse was discovered belonging to the accused. They also found the identity card of the deceased. The arrest was done at 5am on 1 July 2004, the place was dark and they used torch lights to identify the accused. During cross-examination, PW2 admitted that when he arrested the accused, there was information that there was another assailant by the name of Jubert. He also agrees that there was tattoo on the face of the accused.

[6] PW5 was the investigating officer. He said from the information of a person by the name of Angeline, on 29 July 2004, she saw Chong @ Joseph Hending and Jubert fight with the deceased. As Angeline was afraid, she went into the house. PW5 also went to Jubert's work place. Jubert's manager informed him that Jubert was a driver, Malaysian citizen, having identity card No 710805-12-5067 aged 35 years, and having an address at Kampung Likas, Sabah. He was not able to find Jubert.

[7] I have heard the evidence, read the documents, exhibits and submissions of the parties in detail. I take the view that the defence is correct in stating that the prosecution has not made out a prima facie case. My reasons are as follows:

(i) In this case, the main witness for the prosecution was PW1 and he did confirm that the accused was long haired and had a tattoo on the left side of the face. When the accused was identified at the time of the arrest, this statement was further confirmed by PW2. When the photo of the accused after arrest was produced, no 'tattoo' mark was found in the photo. Further, there was also no 'tattoo' mark on the accused at the dock and no evidence was led to explain these discrepancies despite the court's repeated request to throw light on the issue of identification.

(ii) The evidence of PW1 was ambiguous. He gave very sketchy evidence without explaining sufficiently an incident; an incident which, if the court accepts his evidence, will have dire consequence. I will say the evidence of PW1 was such that the police ought to have investigated him in detail in respect of the murder. Further, the prosecution also did not call Ilya, Angeline and the wife of the accused to give evidence or at least to positively identify the accused and to throw some light as to why the incident took place though it may not be necessary for the prosecution to show motive. I have dealt with this area of the law in *Public Prosecutor v Peter Kong* [2007] 5 MLJ 567 the relevant part of which judgment reads as follows:

> Evidence of motive is relevant. Under s 8, the following facts are relevant namely: (i) facts which show motive; (ii) facts that reveal preparation; (iii) facts which divulge previous or subsequent conduct

of any person, provided if it is influenced by any fact in issue or relevant fact; (iv) statement accompanying and explaining acts; (vi) statements made in the presence and hearing of a person whose conduct is relevant provided the statement affects such conduct. Motive is that which induces a person to do a particular act...

In this case the so called direct evidence of PW1 creates real doubt in the identity of the person and the prosecution case is reduced to more of a case of circumstantial evidence and in consequence evidence on motive not only becomes relevant but becomes essential to pass the strict requirement of the prima facie test.

(iii) In this case the wife of the deceased, Lily has identified the accused. However no evidence was led to show how Lily came to know the accused.

(iv) No statements of witnesses who could not be subpoenaed for good reasons, were attempted to be introduced pursuant to the relevant section as set out in s 32(1)(i) and (j) of the Evidence Act 1950.

[8] After having heard the evidence as a whole, I take the view that the prosecution has not made out a prima facie case as set out in *Balachandran*'s case which I have dealt with in detail in *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281, and which is not necessary for me to repeat here.

[9] For reasons stated above, I acquit and discharge the accused with direction to the prosecution that they should attempt to direct the police to do everything possible, to arrest the purported accomplice Jubert, a Malaysian citizen whose identification card detail is available with the prosecution and to make a through investigation in respect of PW1 who gave a very skeletal and sketchy information of the incident.

I hereby order so.

Accused acquitted and discharged.

Reported by Ashgar Ali Ali Mohamed